

On November 20, 2010, defendant Denny Carrero pled guilty and was sentenced on the following charges: trafficking in cocaine, more than 100 grams¹ and trafficking in cocaine, 10-50 grams.² On December 30, 2010, he moved for postconviction relief and on January 6, 2011 he moved to withdraw his guilty pleas.

Carrero offers several grounds for postconviction relief: (1) ineffective assistance of counsel in that his lawyer never told him he would be pleading guilty to two charges of trafficking; (2) the alleged divergence of police testimony between preliminary hearing testimony and the suppression hearing testimony; (3) double jeopardy in that he was charged with trafficking twice but in the same case; and (4) “multiplicitous” charges.

Prior to entering his guilty pleas, Carrero filed on his own a motion to suppress evidence. While trial counsel maintains he advised Carrero to not file any suppression motions, he also filed a motion to suppress on Carrero’s behalf because of Carrero’s *pro se* motion. At the time of the suppression hearing, the State made a plea offer that involved less non-suspendable jail time than the jail time involved with the offenses to which Carrero ultimately pled guilty.

This plea offer, however, was conditioned on Carrero withdrawing his suppression motion. Trial counsel conveyed this choice to Carrero who rejected it and wanted to proceed with the suppression hearing. The hearing was held November 29th before another judge, and the motion was denied in a bench ruling.

¹ 16 *Del. C.* § 4753A(a)(2)c.

² 16 *Del. C.* § 4753A(a)(2)a.

The next day Carrero was scheduled to go to trial on all of the charges against him: trafficking in cocaine, 100 grams or more, with co-defendant Xavier Melendez; possession with intent to deliver cocaine with the same co-defendant; conspiracy second degree with the same co-defendant; trafficking in cocaine, 100 grams or more, no co-defendant; maintaining a dwelling, no co-defendant; possession of drug paraphernalia, no co-defendant; and driving without a license. As indicated, Carrero pled to two trafficking charges, one of which was reduced in severity. He was sentenced on these charges to a total of ten years in jail with varying degrees of work release and probation to follow.

Discussion

Before the Court can undertake a review of Carrero's motion for postconviction relief, it must determine if there are any procedural impediments to doing so.³ This case is in an interesting procedural posture. Ordinarily, in cases where a defendant did not appeal following sentencing, the conviction is final thirty (30) days following the sentencing.⁴ Carrero did not file a direct appeal but his motion was filed just within the thirty day period.⁵ In addition, the Supreme Court does not consider claims of ineffective

³ *Steckel v. State*, 882 A.2d 168, 170 (2005).

⁴ *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995).

⁵ Carrero does not claim ineffective assistance of counsel for failing to file an appeal on his behalf.

assistance of counsel on direct appeal unless adequately raised in this Court.⁶ Despite Carrero's *pro se* suppression motion, the record in this case does not sufficiently meet that standard.

Further, Carrero's motion to withdraw his guilt pleas was filed beyond the thirty day limit. It does not operate to toll that limit. Correctly or incorrectly, this Court will not view Carrero's postconviction motion as untimely.⁷

Two of Carrero's grounds for relief can be addressed briefly as they are interrelated. Those two claims arise out of his pleas to two charges of trafficking in cocaine. He argues the indictment was duplicitous and that his pleas have resulted in double jeopardy.

There is not much of a factual record in this case, but the existing record puts Carrero's claims to rest. Carrero was driving, without a license, a vehicle, that co-defendant Xavier Melendez apparently owned.⁸ Cocaine was found in the car. Later on, the police searched Carrero's apartment and found cocaine there. In each instance over 100 grams were found.

There were, therefore, two distinct incidents of trafficking in cocaine. Melendez was not charged with the cocaine found in Carrero's apartment. Consequently, there is no issue of "double jeopardy" or of a "duplicitous" indictment.

⁶ *Tatum v. State*, 941 A.2d 1009, 1010 (Del. 2007).

⁷ See *Sahin v. State*, 7 A.3d 450 (Del. 2010).

⁸ The indictment charges Melendez with maintaining that vehicle to keep and use drugs.

This disposition relates to one of Carrero's claims for ineffective assistance of counsel, namely that his attorney "let" him plead to two charges of trafficking. To make a successful claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance caused actual prejudice.⁹ Counsel's representation enjoys a strong presumption of reasonableness.¹⁰

Carrero asserts trial counsel never told him he was pleading to two counts of trafficking. Trial counsel responded to this by stating in his affidavit that he carefully reviewed on November 30th, the date of the plea, the charges in the plea agreement and went over in detail the TIS Guilty Plea form which also contains the two trafficking pleas and the separate penalties for those offenses.

The plea colloquy further refutes this claim. First, the prosecutor read the plea agreement in the courtroom a mere few feet from Carrero. Second, Carrero signed it. Third, the Court went over everything in the plea agreement which, of course, included pleading to two charges of trafficking. After reviewing it, the Court asked if Carrero understood, to which he replied that he did. The Court then asked if he had any questions about it, to which he replied he did not. And, of course, the Court read both counts (one being amended to a LIO) of the indictment to Carrero. He said he understood the charges

⁹ *Scott v. State*, 7 A.3d 471, 475 (Del. 2010).

¹⁰ *Grosvenor v. State*, 849 A.2d 33, 35 (2004).

and pled guilty to both. He volunteered at sentencing that he knew he did wrong.

Carrero's response to counsel's affidavit is that he was under pressure and was confused on the 30th. He also attaches a November 4, 2010, letter from counsel, in his response to counsel's affidavit, indicating the *pro se* suppression motion was being presented without his (counsel's) support and without his possible representation. Trial counsel did ask Carrero to indicate if he wanted counsel's continued representation. Apparently, Carrero did because counsel filed a motion to suppress on November 18th and continued to represent him.

Counsel indicates also he repeatedly advised Carrero the best course of action was to get the best "deal" they could. He believed there was not a good faith basis to suppress any evidence.

Trial counsel did not respond to Carrero's claim that there was a difference in the police testimony between the preliminary hearing and the suppression hearing about whether the drugs were or were not found in the car. The Court sees no reason to further explore this claim. One, if there were a difference, Carrero knew it when he plead. Two, Carrero's plea constitutes a waiver of any pre-plea defects.¹¹ If trial counsel were ineffective in his handling of the suppression hearing, however, that waiver would be invalid. Under Superior Court Criminal Rule 32, after sentencing, a plea may only be set

¹¹ *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

aside for reasoning set out in Criminal Rule 61.¹² These reasons, of course, would include ineffective assistance of counsel.

But the Court finds no ineffectiveness. Instead, the current motion is nothing more than dissatisfaction with the denial of the suppression motion. If Carrero were so dissatisfied with that result, he could have rejected the plea offer made on the day of trial. That may have created its own set of problems because, if convicted, as charged, he faced an additional ten minimum years on top of the minimum ten years in the plea agreement and for which he was sentenced.

Also, when he pled guilty he verbally told this Court he was satisfied with his lawyer's advice. He answered affirmatively on the TIS Guilty Plea form that he was satisfied with counsel's advise. Absent a strong showing to the contrary, Carrero is bound by those statements.¹³ Further during the plea colloquy, the Court noted that another judge had denied his suppression motion. The Court asked Carrero if he understood that the guilty plea meant he was giving up his right to appeal that denial decision. He stated he understood that result.

Carrero has failed to demonstrate that trial counsel's conduct fell below some objective standard. His motion to withdraw the guilty plea is devoid of detail but appears

¹² Super. Ct. Cr. R. 32(d).

¹³ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997). Carrero has not made that showing.

to be premised on the same grounds as his motion for postconviction relief. That seems to be a backdoor way of saying he would not have pled guilty but would have gone to trial instead. In that sense, he claims prejudice as a result of counsel's conduct. But since he cannot meet the first prong, the Court need not address the prejudice prong.

In his response to counsel's affidavit, but not in his original motion, Carrero asserts he needed a translator. He says he is from Puerto Rico and the TIS Guilty Plea form says he finished 12th grade. Counsel states he had no trouble conversing with the defendant about his case. They discussed various strategies. They met more than once.

The Court's colloquy with Carrero was a little longer than usual primarily for two reasons. One, discussed above, was to insure he appreciated the waiver of his right to appeal the denial of the motion to suppress. The other was more extensive. Carrero apparently believed the maximum sentence he would get would be the ten year minimum which had to be imposed. He believed his lawyer had guaranteed that.

Because of that mistaken belief, the Court explained several times that his lawyer could not guarantee his sentence. He and his lawyer consulted in court about that, and in the end, he understood only the Court could guarantee his sentence and that he fully appreciated he faced a maximum jail sentence of fifty years with a ten year minimum.

This discussion relates to the interpreter issue Carrero injected into the case in his response to his lawyer's affidavit. His lawyer saw no need for an interpreter during his sessions with Carrero and/or during the plea colloquy. Carrero did not read and fill out

a Spanish language TIS Guilty Plea form (which this judge instituted around fifteen years ago) or ask for one. The Court detected no language problems during the colloquy. Carrero stated he had read and understood the English language Guilty Plea form before signing it. At the Court's direction, he reread the list of trial and appeal rights on the form while in court during the colloquy. He stated he (still) understood them. At no time did he state during the colloquy that there was any language difficulty about anything he was doing.¹⁴

In sum, the Court finds no merit to any portion of Carrero's motion for post-conviction relief. As the Court has found no basis for a claim of ineffective assistance of counsel or any other basis under Rule 61 to grant Carrero's motion to withdraw his plea, that motion is to be denied.

Conclusion

For the reasons stated herein, defendant Denny Carrero's motion for postconviction relief and motion to withdraw his guilty pleas are **DENIED**.

IT IS SO ORDERED.

J.

¹⁴ Unlike *Cruz v. State*, 2 A.3rd 73 (TABLE)(Del. 2010), the substance of the discussion is that the Court finds no need to conduct a hearing on the issue of a need for an interpreter.